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IN THE

United States Supreme Court

OCTOBER TERM—1943

No. 1036 101

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, G. N. TIDD, E. P. SUMMERSON, H. L. ALLER, J. R. HOBBINS, ELECTRIC BOND AND SHARE COMPANY and EBASCO SERVICES INCORPORATED,

Petitioners,

and

S. R. INCH, A. S. GRENIER, C. F. KELLEY, S. A. MITCHELL, P. B. SAWYER, E. B. TRACY, H. T. WHITE, W. R. KENAN, W. V. GRIFFIN, L. H. PARKHURST, W. D. THORNTON, E. ERICSON, F. R. BAUER, J. W. FROST, D. W. JACK, NEBRASKA POWER COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, NORTHERN POWER COMPANY, NORTHWESTERN ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, INLAND POWER & LIGHT COMPANY, PORTLAND GAS & COKE COMPANY, SUPERIOR WATER, LIGHT AND POWER COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY, TEXAS PUBLIC UTILITIES CORPORATION, THE WASHINGTON WATER POWER COMPANY, AMERICAN POWER & LIGHT COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, FLORIDA POWER & LIGHT COMPANY, KANSAS GAS AND ELECTRIC COMPANY and THE MINNESOTA POWER COMPANY,

Defendants,

v.

DORA GOLDSTEIN,

Respondent.

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Defendants,

v.

DORA GOLDSTEIN,

Respondent.

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner-defendants seek certiorari from an interlocutory decree of the Circuit Court of Appeals for the Second Circuit (142 F. 2d 422), which (1) upheld the jurisdiction and venue of the District Court for the Southern District of New York; (2) sustained the legal sufficiency of the complaint; and (3) remanded the case to the District Court for further proceedings (Record, pp. 104-112).

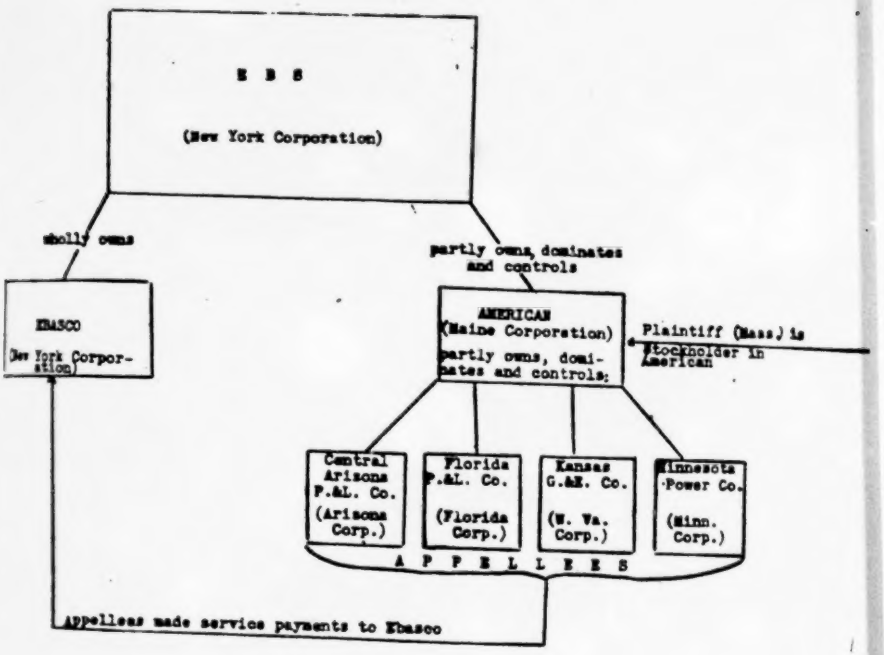
Petitioners do not attack those parts of the decision below which deal with jurisdiction and venue. But they contend that the complaint should have been dismissed for insufficiency. A brief statement of the first cause of action (the second and third have been withdrawn by stipulation) is therefore necessary. (Figures in parenthesis, unless otherwise indicated, refer to folios of the record.)

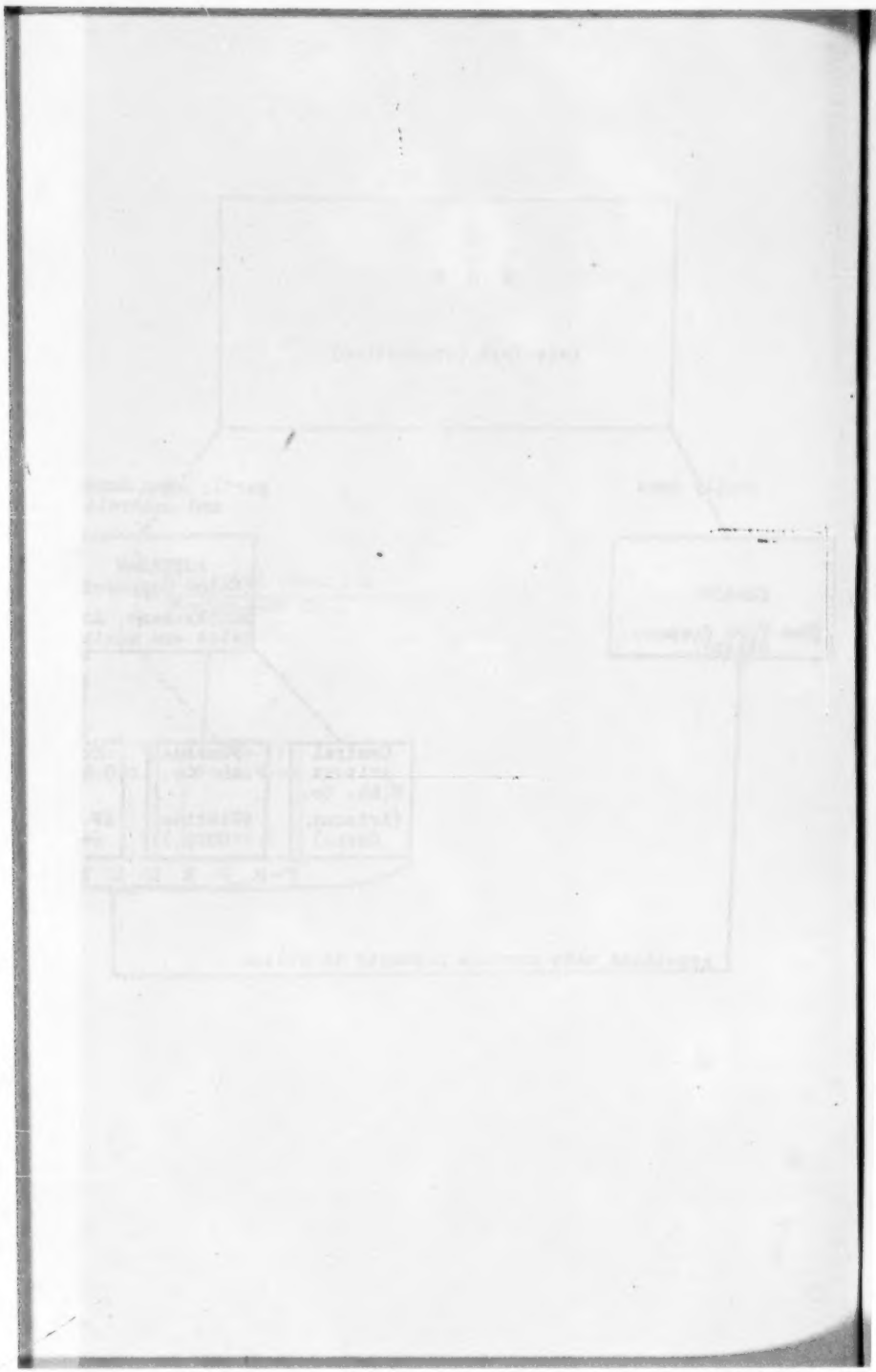
The complaint

Defendant Electric Bond and Share Company ("EBS" hereafter) is the top holding company of a large public utilities system (25-34). EBS owns a controlling stock interest in an intermediate holding company, the defendant American (of which plaintiff is a minority stockholder) (19, 29-30). American, in turn, owns controlling stock interests in a number of operating public utility companies named as defendants herein (the "operating companies" hereafter) (30, 31).

A chart showing the relationship and the domiciles of the corporate defendants is set forth on the opposite page.

EBS dominates and controls the management, personnel and business policies of American and American's operating subsidiaries (30-32).


E B S
(New York Corporation)
wholly owns
partly owns, dominates and controls
EBASCO
(New York Corporation)
AMERICAN
(Maine Corporation)
partly owns, dominates and controls
Plaintiff (Mass.) is stockholder in American
Central Arizona P.&L. Co. (Arizona Corp.)
Florida P.&L. Co. (Florida Corp.)
Kansas G.&E. Co. (W. Va. Corp.)
Minnesota Power Co. (Minn. Corp.)
A P P E L L E E S
Appellees made service payments to Ebasco



In the latter part of 1935 the defendants conspired to flout the newly enacted Public Utility Holding Company Act, 15 U.S.C.A., secs. 79a *et seq.*, by not registering with the Securities and Exchange Commission and by otherwise ignoring its provisions (44, 49, 38). More particularly, they resolved to circumvent Section 4(a)(2) of the Act, 15 U.S.C.A., sec. 79d(a)(2), which forbids unregistered holding companies to make or perform service or construction contracts with operating utility companies.

Pursuant to this conspiracy (44, 49), and only a few days before the effective date of the Utility Act (December 1, 1935), EBS organized two subsidiaries wholly owned and controlled by it, namely, the defendant Ebasco Services, Inc. ("Ebasco" hereafter), and Phoenix Construction Company (which was subsequently merged into Ebasco) (32-34, 45-77). EBS caused the operating companies to enter into service and construction contracts with Ebasco and Phoenix and to make substantial payments under these contracts to Ebasco and Phoenix (47, 50). These contracts and payments, effected through the mails and other means of interstate commerce (47), violated the Utility Act. They continued until April 1, 1938, at which time EBS finally registered with the S.E.C. (38).

This action seeks to recover the unlawful payments on behalf of the operating companies. Although plaintiff holds no stock in them, she is a stockholder of their parent, American (19). As such she brings this action "double derivatively" (R., p. 107).

A previous adjudication by this Court

Shortly after the service and construction contracts were made, the Securities and Exchange Commission brought suit to enjoin their performance on the ground

that they violated Section 4 of the Utility Act. The present defendants, who were also defendants in the injunction suit, counterclaimed to restrain the Government from enforcing Section 4, on the theory that it is unconstitutional. This Court sustained the Government; it affirmed the decisions of the lower courts granting the injunction sought by the S.E.C. and dismissing the counterclaim. *Electric Bond and Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419 (1938), aff'g 92 F. 2d 580 (C.C.A. 2, 1937), aff'g 18 F. Supp. 131 (D.C., S.D.N.Y., 1937). That action will hereafter be referred to as the "EBS action".

This Court thus held in the EBS action:

(a) That Section 4 of the Utility Act is constitutional; and

(b) That the service and constructive contracts (the very contracts involved in the present suit) violate Section 4.

Defendants' stipulations with the Government

At or about the time the S.E.C. instituted the EBS action, it and other Government agencies entered into stipulations with the defendants to the effect,

(a) that pending the final adjudication of the constitutionality of Section 4 of the Utility Act, the Government would not institute civil or criminal proceedings against the defendants for violations of the Act; and

(b) that after a final adjudication sustaining the constitutionality, the Government would not institute criminal proceedings against the defendants for pre-judgment violations of the Act.

The petitioner-defendants invoke these stipulations as granting them immunity from this suit. The stipulations will be discussed in detail (*infra,* pp. 17-21).

The decision below

The Court below in the present case followed the decision of this Court in *Electric Bond and Share Co.* v. *S.E.C., supra,* and drew the inevitable consequences. In short, the Court below held (142 F. 2d 422):

1. The service and construction contracts violate Section 4(a)(2) of the Utility Act, 15 U.S.C.A., sec. 79d(a)(2). (R., pp. 109-110).

2. The contracts are void pursuant to Section 26(b) of the Utility Act, 15 U.S.C.A., sec. 79z(b). (R., p. 110).

3. The operating companies, having made substantial payments under these illegal contracts, are entitled to a refund. (The Court below did not decide whether this recovery should include the full amount of the payments or only that part which exceeded the value of the services rendered.) (R., p. 110).

4. Plaintiff, as a stockholder, may, on behalf of the operating companies, enforce their right to a refund. (R., pp. 107, 110-111).

5. Defendants' stipulations with the Government in the EBS action did not purport to preclude a private suit, such as this action. (R., p. 111).

The petition for certiorari raises no questions calling for a review by this Court

A. The present action, commenced on June 10, 1941 (3), has not progressed beyond the service of the summons and complaint. The decree below sustaining the sufficiency of the complaint is interlocutory. Certiorari "is and generally should be issued only after a final decree"; *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, at 284 (1897). It will not be granted from an interlocutory decree, "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, at 384 (1893). If certiorari is denied in this case, defendants will at long last have to answer the complaint. That is no extraordinary inconvenience.

B. The five questions presented by petitioners (Petition, pp. 3-5) are not of sufficient importance to warrant certiorari.

1. This case, say petitioners, involves the "integrity" of their stipulations with the Government in the EBS action. The stipulations, petitioners argue, granted them immunity regarding the violations of the Utility Act charged in the present suit. Petitioners claim that the decree below "effectively breaches" the stipulations (Pet., p. 3).

But the decree below had no such sinister intent or effect. The Circuit Court did not question the *integrity* of the stipulations, but their *interpretation* by petitioners. It held that "these agreements were simply that no governmental action would be taken against EBS, and did

not, as well as could not, cover the eventuality of private suit" (R., p. 111).

This Court will not grant certiorari merely to review the interpretation of an agreement by the Circuit Court.

2. Petitioners ask, as their second question, whether a stockholder, such as plaintiff, may "repudiate the action of the company in making the stipulation" by bringing the present suit (Pet., pp. 3-4).

This question again turns on the interpretation of the stipulations. The Circuit Court held that the stipulations did not purport to preclude a private action. Petitioners differ with this interpretation. But that is no ground for certiorari.

3. Petitioners' third question is whether the doctrine of *Ex parte Young,* 209 U. S. 123 (1908), should not protect them against the "destructive civil penalties" which, they say, this action would impose on them (Pet., p. 4).

Ex parte Young holds that a statute is unconstitutional where "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation" (209 U. S., at 147). Petitioners imply that Section 4 of the Utility Act, as construed by the Court below, imposes civil "penalties" so destructive as to intimidate them from testing the constitutionality of the statute. This argument raises no serious or important question because:

(a) Petitioners did in fact seek and obtain a judicial determination of the constitutionality of Section 4 of the Utility Act. *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419. There was thus no "intimidation".

(b) Whether or not the recovery in this action will be "destructive" remains to be seen. The Circuit Court expressly refused to rule on the measure of recovery (R., p. 110). The mere surrender by petitioners of their profits—which according to petitioners would be the proper measure of recovery—certainly would not be "destructive".

In advance of the final judgment the argument of destructiveness is thus, to say the least, premature; it confirms the wisdom of the rule that certiorari will ordinarily not be granted from an interlocutory decree.

4. Petitioners' fourth question in effect repeats their first. Section 26(b) of the Utility Act invalidates all contracts violating any provision of the Act. The service contracts here involved violated Section 4(a)(2) of the Act. Petitioners seek a ruling that the service contracts are, nevertheless, valid by reason of their stipulations with the Government.

That question, again, goes to the interpretation of the stipulations. The Circuit Court held that they did not purport to grant petitioners immunity from private suit. Petitioners would favor a different interpretation. But that does not justify certiorari.

5. As their last question, petitioners ask whether Section 4(a)(2) of the Act, which prohibits an unregistered holding company from "directly or indirectly" making and performing service contracts, prohibits such contracts if made by a subsidiary organized for that very purpose. This precise question has already been determined by this Court, which enjoined the very service contracts here involved. *Electric Bond and Share Company* v. *S.E.C.*, 303 U. S. 419. Certiorari should not be

granted to re-consider a question which was but recently determined by this Court.

Not only are petitioners' questions of insufficient importance to warrant certiorari; but, as we now proceed to show, petitioners' criticism of the decision below, even if examined on its merits, is unfounded. For greater clarity, we shall first discuss the basis of our claim and will then turn to the alleged defense based on petitioners' stipulations with the Government.

POINT I

The service and construction contracts violate Section 4(a)(2) of the Utility Act, 15 U.S.C.A., Section 79d(a)(2).

(Replying to Petition, pp. 20-23)

The section, so far as pertinent, provides:

> "Sec. 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—
>
> * * * * * * *
>
> (2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company".

Petitioners contend that the section is inapplicable; for its prohibition is addressed only to "holding com-

panies"; and Ebasco and Phoenix, with whom the service contracts were made, are not in that category.

1. The performance of these very service contracts was enjoined in *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419. The peculiar position of Ebasco and Phoenix and the details of their service contracts were fully disclosed (fols. 1054 *et seq.* of the record in that case). Necessarily, this Court held that these service contracts violated Section 4(a)(2). Indeed, this Court, after summarizing the service contracts (303 U. S., at 432), held (p. 440):

> "That they (defendants) conduct such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test."

2. The violation of Section 4(a)(2) is clear. EBS was an unregistered holding company (35, 36, 38). After the enactment of the Utility Act, and for the very purpose of circumventing it, EBS organized Ebasco and Phoenix and caused them to make the service contracts (44-46, 163-8; see also *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S., at 432). The contracts are, therefore, plainly within Section 4(a) which forbids an unregistered holding company "*directly or indirectly*" to make or perform service contracts.

3. Moreover, Section 27(a) of the Utility Act, 15 U.S.C.A., sec. 79z-1(a), provides:

> "It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it

> would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder."

The section is self-explanatory. The term "person", by definition, includes a corporation; Section 2(a)(1) of the Act, 15 U.S.C.A., sec. 79b(a)(1). Section 27, we submit, establishes that an unregistered holding corporation (such as EBS) performing service contracts through the instrumentality of a wholly owned subsidiary (such as Ebasco and Phoenix) violates Section 4(a)(2).

4. Petitioners argue that the words "directly or indirectly" cannot extend Section 4(a) to include subsidiaries of holding companies; for wherever the Act purports to include subsidiaries, it refers to them expressly.

This argument rests on a misunderstanding of the Act. To be sure, some of the prohibitions of the Act are expressly addressed to subsidiaries; and, accordingly, all subsidiaries are automatically governed by such prohibitions, *without any need of showing that the subsidiary was used for the purpose of circumventing the Act.* Other prohibitions are addressed only to holding corporations, but are amplified by the words "directly or indirectly" and by the broad clauses of Section 27(a); those prohibitions are ordinarily not applicable to subsidiaries; but they must be applied where a holding company uses the subsidiary for the purpose of evading the Act through indirection. Section 4(a) belongs in the second category. Normally, therefore, all subsidiaries may engage in the activities listed in Section 4(a), even though their parents are unregistered. But that privilege ends where an unregistered holding company uses

the subsidiary as a device to evade the Act. By so using the subsidiary, the holding company violates Section 4(a).

In the present case, EBS organized Ebasco and Phoenix for the very purpose of evading the Act (44-46, 163-8). EBS thus violated the Act by indirection; it has, therefore, contravened both the letter and spirit of Section 4(a).

Accord: *Weinberger* v. *Semenenko,* 36 N. Y. Supp. 2d 396, at 406 (S. Ct., N. Y., 1942).

5. Petitioners contend that our construction of Section 4(a) would prevent every operating subsidiary of an unregistered holding company from engaging in the activities listed in Section 4(a), such as the interstate transmission of natural gas or electricity. The result, say petitioners, would be a nation-wide disruption of utility services, which Congress cannot have intended (Pet., p. 22).

Petitioners' apprehension is unfounded. Only those operating subsidiaries are banned which are used by their unregistered parent to *circumvent* the Act. A subsidiary *bona fide* engaged in the interstate activities described in Section 4(a) may continue, even though its parent fails to register.

POINT II

The service contracts are void pursuant to Section 26(b) of the Utility Act, 15 U.S.C.A., Section 79z(b).

(Replying to Petition, p. 19)

Section 26(b), so far as pertinent, provides:

"Every contract made in violation of any provision of this title * * * and every contract

> heretofore or hereafter made, the performance of which involves the violation of * * * any provision of this title * * * shall be void (1) as regards the rights of any person who, in violation of any such provision * * * shall have made or engaged in the performance of any such contract * * *."

This provision would seem to require no comment. Since the service contracts violate Section 4(a) of the Act, they are rendered void by the express provision of Section 26(b).

But petitioners contend that "Section 26(b) of the Act is inapplicable to violations of Section 4(a)" (Pet., p. 19). For this contention they invoke language of Judge Mack in the *EBS* case to the effect that, "with minor exceptions," no provision of the Act other than Sections 4 and 5(a) is applicable to a non-registered holding company such as EBS (Pet., pp. 11, 43). Petitioners conveniently ignore the reference to "exceptions" and conclude that Section 26(b) is not applicable to unregistered holding companies.

This argument would mean that an unregistered holding company may, in the teeth of Section 4 of the Act, enter into service and construction contracts; that, despite Section 26(b), such contracts are valid and enforceable; and that, despite Congressional condemnation of such contracts (Section 1(b)(2) of the Act), our courts must compel their performance. This conclusion hardly commends itself.

But even worse. Petitioners' argument that Sections 4 and 5(a) are literally the only provisions applicable to unregistered holding companies, would also preclude Section 18(f), 15 U.S.C.A., sec. 79r(f). That provision au-

thorizes the S.E.C. to sue to enjoin violations of the Act. According to petitioners, the S.E.C. would be helpless to restrain violations of Section 4 by an unregistered holding company. Or, at least, this is how petitioners would read Judge Mack's decision.*

However, the very suit before Judge Mack was brought by the S.E.C. under Section 18(f). This Court expressly so held; and it sustained the applicability of the section (303 U. S., at 439, 443). So did the Circuit Court (92 F. 2d, at 583) and, by necessary implication, Judge Mack. Since non-registration did not immunize EBS from the reach of Section 18 (f), neither does it exempt EBS from Section 26(b).**

POINT III

Plaintiff may compel the refund of the illegal service payments.

(Replying to Petition, p. 20)

Petitioners do not question the ruling below (R., p. 110) that, under the Utility Act, the operating companies are entitled to a refund. But petitioners contend that this right may be enforced only by the S.E.C., not by plaintiff (Pet., p. 20.).

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* Petitioners' argument would also render inapplicable Section 29, 15 U.S.C.A., sec. 79z-3, which provides criminal penalties for violations of the Act. According to petitioners, an unregistered holding company thus might flout Section 4 with complete impunity.

** From the context of Judge Mack's decision it is plain that he meant to preclude the application to EBS only of Sections 6 to 17 which are in terms confined to *registered* holding companies. Sections 18 to 32 clearly embrace both registered and unregistered companies. This was also Judge Mack's view; witness the fact that his decision (as well as that of this Court and the Circuit Court) turned on Section 32 of the Act (see 18 F. Supp., at 136; 92 F. 2d, at 592; 303 U. S., at 434).

The trouble with this contention is that the S.E.C. has no power to compel the refund. The Circuit Court so held (R., p. 112). Nevertheless petitioners do not even state under what provision of the Act the S.E.C. might proceed. There is no such provision. Hence, if private enforcement were barred, the right to a refund would be without a remedy.

The Court below indicated the grounds justifying private enforcement (R., pp. 110-111). Petitioners do not attempt to controvert this reasoning. We therefore respectfully refer to the decision below, instead of repeating it here.

POINT IV

The doctrine of *Ex parte Young* does not prevent recovery.

(Replying to Petition, pp. 17-18)

Petitioners argue that invalidation of the service contracts would be so harsh a penalty as to discourage any attempt at testing the constitutionality of the Public Utility Act; penalties of that character, it is said, are unconstitutional under the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), and *Missouri P. R. Co.* v. *Tucker*, 230 U. S. 340 (1913).

1. The constitutionality of Section 4(a) has been upheld by this Court after extensive argument and full consideration; *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419.

2. The *Young* and *Tucker* cases condemn only penalties so excessive as to discourage a court test of the constitutionality of the statute. Petitioners have tested

the statute to the hilt; *Electric Bond and Share Co.* v. *S.E.C., supra.* This pragmatic test alone disproves the applicability of the rule of *Ex parte Young.*

3. The rule of the *Young* and *Tucker* cases forbids civil penalties "so arbitrary and oppressive that their enforcement would be nothing short of the taking of property without due process of law" (*Missouri P. R. Co.* v. *Tucker,* 230 U. S., at 351). The imposition of double or treble damages would not come within this definition (*ibid.,* 230 U. S., at 348).

In this case the measure of recovery has not yet been settled (R., p. 110). Perhaps petitioners must surrender only their profits; and certainly they need not pay more than they actually received. Recovery will thus be neither arbitrary nor oppressive.

4. The rule of the *Young* and *Tucker* cases has never yet been applied to statutes invalidating contracts made in violation of a declared public policy. Such statutes are, of course, very numerous. If petitioners' argument were sound, all of them would be unconstitutional. For in every such case a party might enter into a very sizable contract violating the statute, and could then argue that the statute is unconstitutional because it invalidates the contract and thereby subjects the party making it to an excessively harsh penalty.

5. The doctrine of *Ex parte Young* is confined to cases "where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character". *Ex parte Young,* 209 U. S., at 148; *Missouri & P. R. Co.* v. *Tucker,* 230 U. S., at 350; *Noble* v. *Carlton,* 36 F. (2d) 967, at 969 (D.C., S.D. Fla., 1930). The

validity of the Utility Act depends solely upon questions of law. *Weinberger* v. *Semenko, supra,* 36 N. Y. Supp. (2nd) 396, at 405. The doctrine of the *Young* and *Tucker* cases is, therefore, inapplicable.

POINT V

Petitioners' stipulations with the Government do not exempt them from civil liability.

(Replying to Petition, pp. 13-17, 19)

1. The provisions of the Utility Act forbidding and invalidating service contracts of unregistered holding companies are absolute. No public agency or official can override the Congressional mandate, except under authority given by the statute itself. Petitioners profess (Pet., p. 19) to find such authority in Section 20(d) of the Act, 15 U.S.C.A. sec. 79t(d), which, so far as pertinent, provides:

> "No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

2. At the threshold we find that petitioners' stipulations with the Attorney General (Pet., pp. 28, 31-35) and the Postmaster General (Pet., pp. 28-29, 36) are beside the point; for neither of these officials is mentioned in Section 20(d). We turn, therefore, to petitioners' transactions with the S.E.C.

3. Petitioners invoke an S.E.C. press release of November 22, 1935 (Pet., pp. 37-38). Only one sentence thereof is even remotely in point:

> "In the meanwhile, at least for the immediate future and until further notice, the Commission does not intend to make any recommendations to or requests upon the Department of Justice for the institution of proceedings to enforce criminal liabilities under the Act" (Pet., p. 38).

That this provision does not aid petitioners hardly requires comment. The quoted sentence refers only to Committee action, not private action; only to criminal steps, not civil redress; and it operates only for "the immediate future and until further notice".

4. Of petitioners' stipulation with the S.E.C. (Pet., pp. 29-30), only two sentences can possibly have a bearing on this case. The first recites:

> "Neither the Commission nor the Members of the Commission will institute or request the Attorney General or any United States Attorney to institute any further civil or criminal proceedings against the defendants or any of them, or any of their directors, officers, agents or employees, at least until such time as the constitutionality of Sections 4 and 5 of the Act has been finally adjudicated in this proceeding." (Pet., p. 30)

This sentence gives petitioners no comfort; for, apart from other reasons, the Commission's covenant not to sue expired when, on March 28, 1938, this Court finally sustained the constitutionality of Sections 4 and 5 of the Utility Act.

5. The next sentence of the stipulation recites:

> "In the event that Sections 4 and 5 of the Act are adjudicated to be constitutional in this proceeding, neither the Commission nor the Members of the Commission will request the Attorney General or any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act which occurred prior to the date of such adjudication." (Pet., p. 30)

This clause likewise does not aid petitioners.

(a) In contrast to the preceding sentence, the Commission merely foregoes the right to request action by the Attorney General or any U. S. Attorney. There is no suggestion that action by the Commission itself or by private parties is to be precluded.

(b) Even concerning the Attorney General and the U. S. Attorneys the clause is extremely limited. They shall not be requested to "prosecute" petitioners, *i.e.*, to institute *criminal* proceedings against them. Petitioners' *civil* responsibility was thus clearly preserved. This language contrasts with that of the preceding sentence which, until final judgment in the EBS case, barred requests to the Attorney General or any U. S. Attorney to institute "civil or criminal proceedings".

6. The stipulation thus had two very limited objectives: (a) While the EBS action was pending, petitioners were not to be harassed by other Governmental actions, civil or criminal; and (b) after final judgment in the action, petitioners were not to be *criminally* prosecuted for pre-judgment violations. But the right, after termination of the suit, to bring *civil* action for pre-judg-

ment violations was not impaired. Clearly, therefore, the stipulation did not purport to authorize petitioners to do what the Utility Act forbade. It did not purport to secure to them the fruits of their violations of the Act. It did not purport to permit or to make lawful the illegal service contracts. Accordingly, petitioners, in making and performing the service contracts, did not act "in conformity with any rule, regulation or order of the Commission", as required by Section 20(d) of the Act.

7. Because of this limited scope of the stipulation, it is unnecessary to demonstrate that the stipulation is not a "rule, regulation or order" of the S.E.C. within the meaning of Section 20; and that petitioners have not shown and cannot, upon their present motion, show that, in making and performing the service contracts, they acted "in good faith", as required by Section 20(d).

8. Petitioners also invoke a later stipulation allegedly made with the Government on March 31, 1938, after this Court's decision in the EBS case (Pet., pp. 15, 52-54). However, that stipulation is not part of the records of this Court; it cannot, therefore, be considered on this petition. Moreover, petitioners never relied on this alleged stipulation in the Courts below; reliance thereon before this Court is, therefore, improper.

But even if this stipulation might be considered, it would be ineffective, under Section 20(d) of the Utility Act, to protect petitioners. The protection of Section 20(d) applies only to acts "done or omitted in good faith in conformity with any rule, regulation or order of the Commission", even though such order, rule or regulation may subsequently be amended, rescinded or declared invalid. Petitioners' acts charged in the complaint

were all committed prior to the stipulation of March 31, 1938, and, consequently, not in reliance thereon. On April 1, 1938, the day following the stipulation, EBS registered with the S.E.C.

CONCLUSION

Stripped of all technical detail, this complaint alleges that EBS, while assailing the constitutionality of the Utility Act in the courts, continued to exact and to receive from its controlled operating companies service payments which the Act strictly forbade. In common decency and fairness, EBS should have reserved these amounts for return to the operating companies in case EBS should lose its court fight. EBS did finally lose in the courts. But in actuality EBS claims to have won. For it claims the right to retain the illegal service payments, as though the Utility Act had become effective only in April, 1938, and not, by its terms, on December 1, 1935. If, for this period of more than two years, EBS was, indeed, *legibus solutus*, then this complaint must be dismissed. But otherwise petitioners' numerous technical objections, however ingenious, should be brushed aside and the complaint sustained.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, New York, July 8, 1944.

Respectfully submitted,

NATHAN WITT,
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